

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Private Mortgage Investment Services, Inc.,

Debtor.

Case No. 01-14536
Chapter 11

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

Before the court is the balance of a motion by Private Mortgage Investment Services (“Debtor”) requesting a 2004 examination of Kenneth I. Myers, Assistant United States Deputy of the Comptroller of the Currency and for the production of certain documents by the Office of the Comptroller of the Currency (“OCC”). The OCC objects as does Creditor First National Acceptance Company of North America, et al. (“FNAC”).¹

Discussion

On March 4, 2002 the court issued an oral decision which determined, *inter alia*, that the production of the bank examination report is governed by Bankruptcy Rule 2004, notwithstanding *EPA v. General Electric*, 197 F.3d 592 (2d Cir. 1999), which the court found factually distinguishable. Based upon this finding, the OCC was directed to submit two copies of its report for an *in camera* review. One of the copies was to be unaltered; the other copy was to be redacted in conformity with *In re Vescio*, 205 B.R. 37 (D. Vt. 1997). Although maintaining throughout the proceedings that the report was irrelevant because the Debtor’s relationship with FNAC was not one of those examined, the OCC complied with this directive.

After a thorough review of these reports, the court concludes their contents are irrelevant and beyond the scope of 2004. The court further finds that if the reports could be considered relevant, they constitute “deliberative material” and the Debtor has not demonstrated the “good cause” necessary to override the claimed privilege.

¹The court has received written submissions in opposition from FNAC. However, “[t]he bank examination privilege belongs solely to the FDIC ... and other banking regulatory entities, and may not be asserted by third parties on behalf of the banking agencies.” *In re Vescio*, 205 B.R. 37, 42 (D. Vt. 1997) (citation omitted). Therefore, the court will consider FNAC an *amicus curiae*.

Rule 2004

The scope of Rule 2004 is established; subsection “b” states, in part, “[t]he examination of an entity under this rule ... may relate only to the acts, conduct or property or to the liabilities and financial conduct of the debtor, or to any matter which may affect the administration of the debtor’s estate.” While Rule 2004 “is meant to give the inquiring party broad power to investigate the estate” this authority does not necessarily translate into the ability to examine highly sensitive dealings between a creditor and third party. *In re Bennet Funding*, 203 B.R. 24, 27 (Bankr. N.D.N.Y. 1996). Thus, the current request “requires [a balancing of] the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination.” *In re Drexel Burnham Lambert Group, Inc.*, 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991).

When balancing these interests this court is mindful that,

The purpose generally of Rule 2004 is to enable parties in interest to locate assets of the debtor and make those assets available for the creditors of the estate. The examination of a witness as to matters having no relationship to the debtor’s affairs or no effect on the administration of his estate is improper ... It is clear that Rule 2004 may not be used as a device to launch into a wholesale investigation of a non-debtor’s private business affairs. *In re Continental Forge Co., Inc.*, 73 B.R. 1005 (W.D. Pa. 1987) (citations omitted).

Since the report at issue does not contain any information whatsoever pertaining to the Debtor, it seems to be an investigation of FNAC’s private business affairs. Therefore, it is irrelevant and outside the purview of Rule 2004.

Good Cause

Even if this evidence could be considered relevant, the court further finds that the report is primarily “deliberative material” which is subject to the “bank examination privilege” and the

Debtor has failed to establish good cause exists to override the claimed privilege. As previously indicated, “even as to deliberative material...the privilege is not absolute... and may be overridden for good cause.” *In re Vescio*, 205 B.R. at 42. The factors a court should look to when determining if “good cause” exists, include:

- (i) the relevance of the evidence sought to be protected;
- (ii) the availability of other evidence;
- (iii) the ‘seriousness’ of the litigation and the issues involved;
- (iv) the role of the government in the litigation;
- (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are discoverable. *Id.* at 42.

As indicated, the court finds the evidence irrelevant and the Debtor has failed to offer any theory demonstrating how the OCC’s examination of FNAC, one that does not examine the lending relationship between the Debtor and FNAC, would be germane to its contemplated causes of action. Moreover, the Debtor has available to it the formal agreement between FNAC and OCC that resulted from the examination. Therefore, other evidence is in the Debtor’s possession.

The litigation and the issues involved are serious. However, the role of the government in the litigation is remote, at best. Finally, there is a possibility that government employees may censor themselves if they believe that their comments will be disseminated. Although, safeguards such as the privilege should alleviate any concerns of those employees. Weighing all these factors leads the court to conclude that the Debtor has not established the “good cause” necessary to override the bank examination privilege.

Conclusion

For all these reasons, the court concludes that the information sought is irrelevant and outside the parameters of Bankruptcy Rule 2004. Even if the material could be considered

relevant, the report is mainly deliberative in nature, thus, the bank examination privilege is applicable and the Debtor has failed to demonstrate good cause to override the privilege.

Finally, for all the same reasons, the court determines that the request to examine Kenneth I. Myers, Assistant United States Deputy of the Comptroller of the Currency must also be denied.

The court will return the documents in question under separate cover.

Dated:
Albany, New York

Robert E. Littlefield, Jr.
United States Bankruptcy Judge